

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TERRI L. BROWN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,¹

Defendant.

CASE NO. 12-cv-5387-RBL-JRC

REPORT AND
RECOMMENDATION ON
PLAINTIFF'S COMPLAINT

Noting Date: August 23, 2013

This matter has been referred to United States Magistrate Judge J. Richard
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
271-72 (1976). This matter has been fully briefed (*see* ECF Nos. 14, 17, 20).

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security
Administration on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil
Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit.

1 After considering and reviewing the record, the Court finds that the ALJ
2 mistakenly assessed the results of plaintiff's mental status examination ("MSE") as
3 performed by examining doctor, Dr. Terilee Wingate, Ph.D. The ALJ then erroneously
4 found that Dr. Wingate's assessments were not supported by her MSE findings. For
5 these, and other reasons, as discussed below, this matter should be reversed and
6 remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for
7 further consideration.

8 BACKGROUND

9
10 Plaintiff, TERRI L. BROWN, was born in 1959 and was forty-seven years old on
11 her alleged date of disability onset of July 16, 2006 (*see* Tr. 154). Plaintiff graduated
12 from high school, took some vocational tech classes and has a license in barbering (*see*
13 Tr. 54). Although plaintiff never worked as a barber, she has six years of banking
14 experience before 1995 (*see* Tr. 55).

15 Since her banking experience, plaintiff has done clerical and administrative work,
16 however she testified that she no longer could do this work due to problems with
17 focusing and numbness (*see* Tr. 55-56). Plaintiff testified that she was let go from one job
18 in which she had difficulties reading the font on the screen and in which she refused to
19 pop the popcorn as she did not want to get her office clothes oily (*see* Tr. 59-60). She
20 noted that popping corn was not part of her job description (*see* Tr. 59).

21
22 Plaintiff has at least the severe impairments of depressive disorder not otherwise
23 specified and anxiety disorder not otherwise specified (*see* Tr. 38).

1 At the time of the hearing, plaintiff testified that she was homeless but that she
2 lived with an elderly lady and “did duties” for her (*see* Tr. 60). In her treatment record,
3 plaintiff indicated to an examining doctor that she “does cleaning and some yard work to
4 stay there” (*see* Tr. 342). Plaintiff further testified that she attended at least three to five,
5 and sometimes six, support meetings a week, such as twelve step programs (*see* Tr. 62).

6 PROCEDURAL HISTORY

7
8 Plaintiff filed an application for disability insurance benefits (“DIB”) pursuant to
9 42 U.S.C. § 423 (Title II) and an application for Supplemental Security Income (“SSI”)
10 benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (*see* Tr.
11 36, 154-64). The applications were denied initially and following reconsideration (Tr. 93-
12 96, 98-102). Plaintiff’s requested hearing was held before Administrative Law Judge
13 Ruperta M. Alexis (“the ALJ”) on December 28, 2010 (*see* Tr. 49-85). On January 13,
14 2011, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not
15 disabled pursuant to the Social Security Act (*see* Tr. 33-48).

16 On December 9, 2011, the Appeals Council denied plaintiff’s request for review,
17 making the written decision by the ALJ the final agency decision subject to judicial
18 review (Tr. 6-11). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court
19 seeking judicial review of the ALJ’s written decision in May, 2012 (*see* ECF Nos. 1, 3).
20 Defendant filed the sealed administrative record regarding this matter (“Tr.”) on
21 September 24, 2012 (*see* ECF Nos. 9, 10). In plaintiff’s Opening Brief, plaintiff raises the
22 following issues: (1) Whether or not the ALJ properly evaluated the medical evidence;
23 (2) Whether or not the ALJ properly evaluated plaintiff’s testimony; (3) Whether or not
24

1 the ALJ properly evaluated the lay evidence; (4) Whether or not the ALJ properly
 2 assessed plaintiff's residual functional capacity ("RFC"); (5) Whether or not the ALJ
 3 erred by basing her step four finding on a RFC that did not include all of plaintiff's
 4 limitations; and (6) Whether or not this matter should be remanded for a new hearing
 5 based on new evidence (*see* ECF No. 14, p. 2).

6 STANDARD OF REVIEW

7
 8 Plaintiff bears the burden of proving disability within the meaning of the Social
 9 Security Act (hereinafter "the Act"); although the burden shifts to the Commissioner on
 10 the fifth and final step of the sequential disability evaluation process. *Meanel v. Apfel*,
 11 172 F.3d 1111, 1113 (9th Cir. 1999); *see also Johnson v. Shalala*, 60 F.3d 1428, 1432
 12 (9th Cir. 1995); *Bowen v. Yuckert*, 482 U.S. 137, 140, 146 n. 5 (1987). The Act defines
 13 disability as the "inability to engage in any substantial gainful activity" due to a physical
 14 or mental impairment "which can be expected to result in death or which has lasted, or
 15 can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.
 16 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled pursuant to the Act only if
 17 plaintiff's impairments are of such severity that plaintiff is unable to do previous work,
 18 and cannot, considering the plaintiff's age, education, and work experience, engage in
 19 any other substantial gainful activity existing in the national economy. 42 U.S.C. §§
 20 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir.
 21 1999).

22
 23 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 24 denial of social security benefits if the ALJ's findings are based on legal error or not

supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (quoting *Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)); see also *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Regarding the question of whether or not substantial evidence supports the findings by the ALJ, the Court should ““review the administrative record as a whole, weighing both the evidence that supports and that which detracts from the ALJ’s conclusion.”” *Sandgathe v. Chater*, 108 F.3d 978, 980 (1996) (per curiam) (quoting *Andrews, supra*, 53 F.3d at 1039). In addition, the Court must independently determine whether or not ““the Commissioner’s decision is (1) free of legal error and (2) is supported by substantial evidence.”” See *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2006) (citing *Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

DISCUSSION

1. Whether or not the ALJ properly evaluated the medical evidence.

Plaintiff alleges that the ALJ erred in evaluating the treatment record of plaintiff’s treating physician of nineteen years, Dr. Kenneth Ritter, M.D., by failing to discuss the record on the basis of illegibility and by making significant findings contrary to the doctor’s treatment record. Defendant responds that any error is harmless as the doctor did not provide opinions regarding specific functional limitations. The evidence from the

1 treating physician appears to be significant, probative evidence that the ALJ should have
2 discussed given multiple indications of PTSD in the treatment records and given the
3 ALJ's finding that plaintiff's PTSD was not a severe impairment.

4 Plaintiff also alleges that the ALJ erroneously discussed the objective medical
5 evidence gleaned from examining doctor, Dr. Terilee Wingate, Ph.D., then erroneously
6 relied on a lack of objective evidence from Dr. Wingate's report to fail to credit fully her
7 opinion. The Court agrees, and finds this error to be of the clearest harm; therefore, the
8 Court will discuss this contention first.

9
10 According to the Ninth Circuit, even if a treating or examining doctor's opinion is
11 contradicted, that opinion can be rejected only "for specific and legitimate reasons that
12 are supported by substantial evidence in the record." *Lester v. Chater*, 81 F.3d 821, 830-
13 31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)).

14 a. Dr. Terilee Wingate, Ph.D., examining doctor

15 Dr. Wingate examined and evaluated plaintiff in August, 2009 (Tr. 335-47). She
16 conducted a clinical interview and a mental status examination ("MSE") (*see id.*). For
17 example, Dr. Wingate observed plaintiff's dysphoric mood and full affect (*see* Tr. 345).
18 She assessed that plaintiff was impaired at her three step task performance and included a
19 comment that plaintiff "combined 2 & 3" (*see id.*). Dr. Wingate also observed that
20 plaintiff committed one error in her serial 3s and committed one error in her serial 7s (*see*
21 *id.*).

22
23 Dr. Wingate assessed that plaintiff suffered from various specific functional
24 limitations in her ability to perform on a normal day to day work basis (*see* Tr. 343). For

1 example, Dr. Wingate opined that plaintiff suffered from moderate limitations on her
2 ability to understand, remember and follow complex (more than two step) instructions,
3 and supported this opinion by noting her observations following MSE of “6 digits
4 forward, 4 backward, 2nd trial; Serial 3’s and 7’s with 1 error each” (*see* Tr. 343, 345).
5 Dr. Wingate also opined that plaintiff suffered from moderate limitation in her ability to
6 learn new tasks (*see* Tr. 343). Again, Dr. Wingate supported her opinion with specific
7 finding from plaintiff’s MSE and her assessment the plaintiff had “some concentration
8 problems” (*see id.*).
9

10 First, regarding the ALJ’s step two finding, the ALJ in her written decision
11 declined to find that plaintiff suffered from the severe impairment of PTSD on the basis
12 of a lack of assessment from an acceptable medical source regarding whether or not
13 plaintiff met the diagnostic criteria of this diagnosis (*see* Tr. 39).

14 Step-two of the administration’s evaluation process requires the ALJ to determine
15 whether or not the claimant “has a medically severe impairment or combination of
16 impairments.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted);
17 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). The “step-two determination of
18 whether a disability is severe is merely a threshold determination of whether the claimant
19 is able to perform his past work.” *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007).
20

21 “An impairment or combination of impairments can be found ‘not severe’ only if
22 the evidence establishes a slight abnormality that has ‘no more than a minimal effect on
23 an individual[’]s ability to work.’” *Smolen, supra*, 80 F.3d at 1290 (*quoting Yuckert v.*
24 *Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (*adopting* Social Security Ruling “SSR” 85-

1 28)). The step-two analysis is “a *de minimis* screening device to dispose of groundless
2 claims.” *Smolen, supra*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54
3 (1987)).

4 According to Social Security Ruling 96-3b, “[a] determination that an individual’s
5 impairment(s) is not severe requires a careful evaluation of the medical findings that
6 describe the impairment(s) (*i.e.*, the objective medical evidence and any impairment-
7 related symptoms), and an informed judgment about the limitations and restrictions the
8 impairments(s) and related symptom(s) impose on the individual’s physical and mental
9 ability to do basic work activities.” SSR 96-3p, 1996 SSR LEXIS 10 at *4-*5 (citing SSR
10 96-7p); *see also Slayman v. Astrue*, 2009 U.S. Dist. LEXIS 125323 at *33-*34 (W.D.
11 Wa. 2009) (unpublished opinion).

13 Although plaintiff contends that Dr. Kenneth Ritter, M.D., plaintiff’s treating
14 physician, diagnosed plaintiff with PTSD, such a diagnosis is not clear from the record
15 despite notations of PTSD (*see* Tr. 317, 318, 358). It is clear from the record, however,
16 that Dr. Wingate diagnosed plaintiff with PTSD (*see* Tr. 342). Therefore, the ALJ’s
17 finding that no acceptable medical source had reviewed whether or not plaintiff’s
18 symptoms met the diagnostic criteria of PTSD is not supported by substantial evidence in
19 the record as a whole (*see* Tr. 39, 342). This finding by the ALJ also suggests that the
20 ALJ failed to evaluate thoroughly the opinion of Dr. Wingate. This suggestion is further
21 evidenced by the ALJ’s failure to credit fully Dr. Wingate’s opinions.

23 The ALJ failed to credit Dr. Wingate’s opinions in part due to a finding that her
24 report was not “supported by the evidence” (*see* Tr. 43 (citing Ex. 11F, *i.e.*, Tr. 335-47)).

1 However, the ALJ's finding is not supported by substantial evidence in the record
2 because the ALJ relied on an erroneous assessment of the evidence provided by Dr.
3 Wingate when making this determination.

4 In addition to failing to note Dr. Wingate's diagnosis of PTSD, the ALJ reviewed
5 Dr. Wingate's MSE and noted erroneously that plaintiff "performed a three step task and
6 completed the serial threes testing" (*see* Tr. 43). As indicated previously, Dr. Wingate
7 assessed that plaintiff was impaired at the three step task and erred in the serial threes
8 testing (*see* Tr. 345). In fact, Dr. Wingate specifically cited these MSE results when
9 indicating her opinion that plaintiff suffered from moderate limitation in her ability to
10 understand, remember and follow complex (more than two step) instructions (*see* Tr.
11 343). Therefore, for this reason and based on the relevant record, the Court concludes that
12 the ALJ's finding that "these results do not seem to support the moderate limitations
13 checked" is not supported by substantial evidence in the record as a whole.

15 The ALJ's finding that the MSE results do not support moderate limitations is
16 based on an erroneous assessment of plaintiff's MSE results. The ALJ compounded this
17 error by ignoring Dr. Wingate's specific reasons provided next to her "checked boxes"
18 (*see* Tr. 43). As already discussed, Dr. Wingate included typed notations onto the form,
19 supporting her findings of moderate limitations and the support consisted of the very
20 MSE results misinterpreted by the ALJ (*see* Tr. 343). The ALJ compounded this error
21 when she indicated that "check-off reports that do not contain explanation of the reasons
22 for their conclusions may permissibly be discounted" (*see* Tr. 43 (citation omitted); *see*
23
24

1 also Tr. 343). To the contrary, Dr. Wingate offered explicit reasons for her conclusions
2 next to her checked-off boxes (*see* Tr. 43, 343, 345).

3 Defendant's indication that the ALJ noted the "brief notations" by Dr. Wingate
4 and found that they did not support the check-box responses is contradicted by the ALJ's
5 implication that Dr. Wingate's checked-off boxes did not contain any explanations and is
6 contradicted by the ALJ's findings that are contrary to Dr. Wingate's narrative notations
7 (*see* Response, ECF No. 17, p. 7).

8 The Court also concludes that these errors are not harmless.

9 The Ninth Circuit has "recognized that harmless error principles apply in the
10 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). The
11 Court noted multiple instances of the application of these principles. *Id.* (collecting
12 cases). The Ninth Circuit noted that "in each case we look at the record as a whole to
13 determine [if] the error alters the outcome of the case." *Id.* The court also noted that the
14 Ninth Circuit has "adhered to the general principle that an ALJ's error is harmless where
15 it is 'inconsequential to the ultimate nondisability determination.'" *Id.* (*quoting*
16 *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (other
17 citations omitted). The court noted the necessity to follow the rule that courts should
18 review cases "'without regard to errors' that do not affect the parties' 'substantial
19 rights.'" *Id.* (*quoting Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009) (*quoting* 28 U.S.C.
20 § 2111) (codification of the harmless error rule)).
21
22

23 The Court concludes that the ALJ's errors in evaluating Dr. Wingate's opinion are
24 not inconsequential to the determination regarding nondisability herein. First, the ALJ

1 based her finding that plaintiff's PTSD was not severe on an erroneous failure to observe
2 that Dr. Wingate had diagnosed plaintiff with PTSD. Defendant ignores this issue (*see*,
3 *e.g.*, Response, ECF No. 17, p. 2; *see also* Opening Brief, ECF No. 14, pp. 3-4). The ALJ
4 indicated that she considered plaintiff's alleged symptoms "in conjunction with the
5 severe anxiety disorder found above;" but, there is no indication in the ALJ's written
6 decision that the ALJ considered plaintiff's symptoms from her PTSD when making the
7 determination regarding plaintiff's RFC and when making the ultimate determination that
8 plaintiff was not disabled. Therefore, this error is not harmless.

9
10 The ALJ further demonstrated a lack of careful review of Dr. Wingate's opinion
11 by finding that plaintiff performed tasks on which Dr. Wingate opined that plaintiff was
12 impaired and on which plaintiff had committed errors. It is clear that the ALJ's
13 assessment of the severity of plaintiff's limitations failed to include a proper review of
14 Dr. Wingate's opinion. The Court concludes that this failure likely affected the ALJ's
15 assessment of plaintiff's RFC and her ultimate determination regarding nondisability.

16 For the reasons stated and based on the relevant record, the Court concludes that
17 this matter should be reversed and remanded for further consideration.

18
19 b. Dr. Kenneth Ritter, M.D., treating physician

20 The ALJ failed to acknowledge Dr. Ritter's diagnosis of PTSD apparently due to
21 an inability to read Dr. Ritter's treatment records (*see* Tr. 38; *see also* Tr. 313-21). It is
22 true that Dr. Ritter's treatment records are not very clear, but it also is clear that there are
23 multiple references to PTSD (*see* Tr. 317, 318; *see generally*, Tr. 313-21). Given the
24

1 ALJ's duty to develop the record when presented with ambiguous evidence, the Court
2 concludes that the ALJ's reasoning regarding Dr. Ritter's opinion is not specific and
3 legitimate and supported by the record as a whole. *See Mayes v. Massanari*, 276 F.3d
4 453, 459-60 (9th Cir. 2001). Dr. Ritter was plaintiff's treating physician for nineteen
5 years, and as such, his opinion is entitled to special deference (*see* Tr. 69). Following
6 remand of this matter, the ALJ may seek to obtain more legible records from Dr. Ritter,
7 as well as an explicit functional assessment.

8
9 "A treating physician's medical opinion as to the nature and severity of an
10 individual's impairment must be given controlling weight if that opinion is well-
11 supported and not inconsistent with the other substantial evidence in the case record."
12 *Edlund v. Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at
13 *14 (9th Cir. 2001) (*citing* SSR 96-2p, 1996 SSR LEXIS 9); *see also* 20 C.F.R. §
14 416.902. The decision must "contain specific reasons for the weight given to the treating
15 source's medical opinion, supported by the evidence in the case record, and must be
16 sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator
17 gave to the [] opinion." SSR 96-2p, 1996 SSR LEXIS 9. In general, more weight is given
18 to a treating medical source's opinion than to the opinions of those who do not treat the
19 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (*citing* *Winans v. Bowen*,
20 853 F.2d 643, 647 (9th Cir. 1987)).

21
22 The ALJ's failure to credit fully Dr. Ritter's opinion or offer specific and
23 legitimate reasons for rejecting his opinion is grounds for reversal and the Court
24 recommends reversal for this reason, also.

2. **Whether or not the ALJ properly evaluated plaintiff's testimony.**

A determination of a claimant's credibility relies in part on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). The Court already has determined that the ALJ failed to evaluate properly the medical evidence, *see supra*, section 1. Therefore, plaintiff's testimony and credibility should be assessed anew following remand of this matter. Similarly, the lay evidence and plaintiff's RFC should be determined anew.

CONCLUSION

Based on the stated reasons, and the relevant record, the undersigned recommends that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for further consideration. **JUDGMENT** should be for **PLAINTIFF** and the case should be closed.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on August 23, 2013, as noted in the caption.

Dated this 29th day of July, 2013.



J. Richard Creatura
United States Magistrate Judge